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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956 No. 886

LUCILLE H. BURCH,
Petitioner,

v.

READING COMPANY,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION

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PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

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QUESTIONS PRESENTED.

I. In an action under the Federal Employers' Liability Act,[1] did the Court of Appeals err in affirming the action of the Trial Judge in directing the jury to disregard certain testimony of a plaintiff's witness and certain documents introduced by plaintiff in an attempt to establish that plaintiff was injured due to defendant's negligence in requiring plaintiff, a woman, to perform work too heavy for her, where neither the testimony nor the documents supported the contention, plaintiff herself testified that she was capable of performing heavy work, the testimony established that she was actually doing light work at the time of her accident, and there was no evidence that her fall was due to the type of work then being performed by her?

II. Did the Court of Appeals err in affirming the action of the Trial Judge in instructing the jury, *inter alia,* that, in considering whether defendant used reasonable care to provide plaintiff with a safe place to work, the jury should consider the length of time any allegedly unsafe condition had existed and whether defendant had sufficient notice of such condition?

III. Did the Court of Appeals err in affirming the action of the Trial Judge in instructing the jury, *inter alia,* that if they should find that the injury resulted from an accidental slip on one of a few pebbles, neither the plaintiff nor the defendant could be said to be negligent, where the pleadings and the arguments of counsel raised, and the testimony supported, the possible defense of unavoidable accident?

IV. Did the Court of Appeals err in affirming the action of the Trial Judge in using the words "doubt" and "convince" in the course of charging that plaintiff

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[1] 35 Stat. 65 as amended 36 Stat. 291, 53 Stat. 1404, 45 U. S. C. § 51 *et seq.*

had the burden of proving defendant's negligence by a preponderance of the evidence?

V. Where the closing argument of counsel for plaintiff contained statements, designed to arouse the sympathy of the jury and unsupported by any testimony, implying that plaintiff should receive a substantial verdict to assist in supporting two small foster children, did the Court of Appeals err in affirming the action of the Trial Judge in instructing that the jury "should no more be swayed by sympathy for the plaintiff than for the widows and orphans who may be receiving dividends or interest from the defendant company and who may need that income for themselves and their families" and that no sympathy of any sort for either side should play a part in the decision?

STATEMENT OF THE CASE.

Plaintiff brought an action under the Federal Employers' Liability Act for injuries allegedly sustained by her when she fell upon a street at Scotts Lane Crossing, Philadelphia, while she was working as a track laborer, on or about November 27, 1950. The testimony at the trial November 15-18, 1955, summarized briefly, was as follows:

Plaintiff testified that she went to work for Reading Company in 1944 as a section laborer; that with a gang of other laborers she went to Scotts Lane Crossing at 7 o'clock A. M. November 27, 1950, to make repairs by filling in holes under the rails of defendant's tracks; that she was 5 feet 4 inches tall and weighed 180 to 185 pounds (73a); that it was her job to dig dirt out of a pile alongside the crossing and carry it to the point on the crossing where the holes were located; and that while walking back from the rail to the pile of dirt, carrying an empty shovel, she fell, about 8:15 a.m. She testified

that she fell upon the paved surface of the City street about 3 feet south of the rail and about 2½ feet in from the edge of the street; that she was wearing galoshes, overalls, and a jacket; that when she fell she could feel her feet rolling out from under her and could feel pebbles about the size of her little fingernail (25a); and that the street was worn out and covered with hundreds of pebbles (25a).

Upon cross-examination, plaintiff admitted that she was hired to do the same work as male track laborers, lifting ties, working on rails, pulling spikes out of rails, and shovelling ballast, (46a-47a) and that she had been able to do that type of work continuously for six years prior to the accident (48a); that she was accustomed to working on ballast which was dumped loosely in between the ties along the track by a machine (47a); that at the crossing there were pebbles all the way from the rails to the bottom of the hill, a distance in excess of 100 feet (25a, 55a); that she saw the pebbles on the street before she fell (55a); and that she walked just as carefully as she could doing her work, but the accident happened (55a). Plaintiff further admitted that at a hearing in January 1951 held by defendant two months after the accident, she had testified that she did not know what caused her to fall, she did not know the condition of the street and she did not mention the existence of any pebbles (63a-71a).

Joseph E. Osborne, Field Supervisor of the Department of Streets of the City of Philadelphia, testified that he went to Scotts Lane Crossing to supervise the repaving of it in April 1951, five months after the accident (123a), and that at the time the street was full of holes, depressions and cracks, and there was a steep grade (123a-129a).

Upon cross-examination, Osborne admitted that he could not testify of his own knowledge as to the condition of Scotts Lane in November of 1950, or whether it was

the same as in April 1951 (129a), or whether there was any hole within 3 or 4 feet of where plaintiff fell (131a), because he only drove over it once or twice a month; and that Scotts Lane was repaved in 1951 as the result of a City ordinance approved May 24, 1950, six months prior to plaintiff's fall (131a).

In an effort to show that the plaintiff, at the time of her accident, was performing work which she should not have been required to do and which was imposed upon her by her immediate supervisors without the approval of the management of defendant (40a-42a), counsel for plaintiff called R. W. Morrison, Track Supervisor of Reading Company, and confronted him with a memorandum dated April 20, 1949, relating to a certain train trip to be made by defendant's Board of Directors on April 26, 1949 (1½ years prior to the accident) which contained, *inter alia*, the following sentence: "* * * also make general clean-up of papers, rubbish, and so forth, on your section, and keep your women laborers out of sight when this train passes." Mr. Morrison testified, contrary to the contention of plaintiff's counsel, that the above-described sentence was placed in the memorandum because he did not wish to be criticized by the Board of Directors who were riding upon that train, if they were to see women laborers doing light work, such as picking up papers, rather than the usual heavy work for which track laborers are customarily assigned (153a-154a); and that the Board of Directors knew that the railroad had in its employ women hired to do regular track labor (155a).

Plaintiff produced no testimony to show that the memorandum in question was written for the purpose of concealing from the Board of Directors the fact that women laborers were working at regular track labor, nor did plaintiff produce any testimony to show that the order contained in the memorandum bore any relation to the work being done by plaintiff on the date of her accident or in any way contributed to her accident. Plaintiff's

foreman, DiLuzio, called in rebuttal by counsel for plaintiff, testified that he neither received the memorandum of April 20, 1949, nor had he discussed it with his supervisors (289a-290a). At the conclusion of the testimony, upon motion by counsel for defendant, the Trial Judge directed that the testimony of Mr. Morrison, the contents of the memorandum and all other testimony relating to the subject of that memorandum be stricken and disregarded by the jurors.

Defendant produced plaintiff's foreman, DiLuzio, who testified that he came to the scene five minutes after the accident; that the street at the point where plaintiff fell was smooth and in good condition; that he saw a dirty or ashen colored heel or shoe mark where plaintiff fell; that there were only 20 or 30 scattered pebbles in the general area where she fell and only 1, 2 or 3 pebbles at the shoe mark (221a-222a); and that she was doing light work (229a-230a).

Defendant likewise produced the testimony of Larry Chiolan, Plant Engineer of the Fred Whitaker Company, which was located adjacent to Scotts Lane Crossing. Mr. Chiolan testified that the contract for the repaving of Scotts Lane from Abbottsford Road to Ridge Avenue was let as a result of an ordinance which was introduced following negotiations between the Fred Whitaker Company and the City, because the Whitaker Company desired to have Scotts Lane widened in order to permit its large tractor-trailer trucks to enter the plant from Abbottsford Road; that he, himself, passed the crossing going to and from work at least twice every day during November of 1950 and that the condition of the road was generally good (231a-237a).

After a full and complete charge by the Trial Judge (342a-357a) the jury returned a verdict in favor of defendant. Petitioner's motion for a new trial was denied in an opinion reported at 140 F. Supp. 136 (376a-412a). Upon appeal by petitioner from judgment entered by the

District Court, that judgment was affirmed by the United States Court of Appeals for the Third Circuit on January 8, 1957, and is reported at 240 F. (2d) 574. The Petition for certiorari followed.

ARGUMENT.

The instant case is not one in which certiorari should be granted for the following reasons:

1. The decision of the Court of Appeals is not in conflict with any of the decisions cited in the Petition but is, on the contrary, consonant with the principles enunciated in decisions of this and other Courts.

2. There is no reason to believe that the decision will, as alleged in the Petition, "generate a flood of additional litigation and appeals" either in cases under the Federal Employers' Liability Act or in general civil litigation.

3. The case turns upon a simple, if unusual, set of facts and does not call for the determination by this Court of any important principles of law.

4. The case was presented to a jury upon a full, complete and fair charge and resulted in a verdict for defendant, not because of any errors of law, but because of the inadequacy and unbelievability of plaintiff's testimony in support of her theory of liability.

POINT I.

The Court of Appeals correctly affirmed the action of the Trial Judge in withdrawing from the jury's consideration the testimony of plaintiff's witness Morrison and documents relating thereto, since they failed to create any inference that plaintiff's injury was the result of defendant's negligence in requiring her to do work too heavy for her.

Petitioner contends that the Trial Judge erroneously withdrew from the jury's consideration one of two issues,

namely, the issue of defendant's negligence in allegedly requiring plaintiff to do work too heavy for her. Examination of that evidence discloses, however, that it was of no probative value in supporting plaintiff's theory of liability.

In essence, the evidence consisted of a memorandum relating to a particular train trip in April of 1949 (1½ years prior to plaintiff's accident), wherein defendant's track supervisor, *inter alia,* directed that women laborers be kept out of sight when the train, carrying the company's Board of Directors, passed; and a notice of a hearing in February 1949 (also 1½ years prior to plaintiff's accident), indicating that a woman laborer (not plaintiff) had previously complained that the work was too hard for her.

Plaintiff's efforts to relate these documents to the work plaintiff was doing at the time of her accident failed completely, for the following reasons:

(1) The track supervisor testified that the employment of women as track laborers was known to the Board of Directors, and that they were hired at men's rate of pay with the understanding that they would do the same work as men (159a);

(2) Plaintiff herself testified that she was and had been capable of performing all of the duties of a track laborer (including lifting ties, pulling spikes out of rails and shovelling ballast) throughout the six years of her employment (46a-48a), and did not testify either that she was in any way fatigued by the work she was doing at the time of her accident or that she complained that the work was too difficult for her;

(3) Plaintiff's foreman testified that he never received or discussed with his supervisor the memorandum of April 1949 and no evidence was offered to show that its contents were applicable to the work being done by plaintiff at the time of her accident;

(4) Plaintiff's foreman testified that the work being performed by plaintiff on the day of her accident (carrying a shovel to put dirt in a hole) was light work as contrasted with regular track work;

(5) Plaintiff testified that at the time she fell she was walking on the street carrying an empty shovel.

While it has been the policy of the Courts to construe liberally the provisions of the Federal Employers' Liability Act and to permit issues of liability to be determined by a jury, where there is some evidence from which the jury might infer negligent conduct on behalf of a defendant railroad employer (as in the cases cited by the Petitioner), a plaintiff is not entitled to have an issue presented to the jury where there is no evidence, nor any inference which reasonably may be drawn from the evidence, in support of that issue: *Moore* v. *Chesapeake & O. R. Co.*, 340 U. S. 573, 95 L. ed. 547, 71, S. Ct. 428 (1951); *Eckenrode* v. *Pennsylvania R. Co.*, 335 U. S. 329, 93 L. ed. 41, 69 S. Ct. 91 (1948); *Brady* v. *Southern R. Co.*, 320 U. S. 476, 88 L. ed. 239, 64 S. Ct. 232 (1943).

It should also be noted that the cases cited in the Petition (page 13), relating to the theory of liability based upon failure to provide additional help to a railroad employee, are cases wherein there was testimony that the employee had complained to his employer of the difficulty of the work or the need for additional help and the employer had failed or refused to provide such help or to permit the employee to be relieved. Such cases are not applicable to the facts of the instant case, and no case cited by petitioner holds that an employee is entitled to recover upon that theory where there is no evidence that the employer had received notice, either from the employee or otherwise, that the employee was unable properly to perform his work.

The Trial Judge correctly withdrew the testimony from the jury's consideration, leaving open for its consideration the issue as to whether defendant had failed to use reasonable care to provide plaintiff with a reasonably safe place to work; the Court of Appeals correctly affirmed this action.

POINT II.

The Court of Appeals correctly affirmed the action of the Trial Judge in charging the jury that if an unsafe condition existed where plaintiff was working, the length of time that the condition had existed prior to the accident was to be considered in determining whether defendant had sufficient notice of the condition so that it could be considered negligent for failing to remedy the condition.

In its charge to the jury the Court read plaintiff's point for charge No. 8 as follows (339a-340a):

> "The duty of providing a reasonably safe place to work imposes upon the employer the affirmative duty of inspecting the place where its employees are to work and imposes a duty on the employer to search out defects or hazards which would normally be revealed thereby and the failure to make such reasonable inspection or to learn of the conditions which a reasonable inspection would reveal is negligence. If you find that the plaintiff in this case suffered her injuries, in whole or in part, because such an inspection was not made and therefore, not corrected, then your verdict must be for the plaintiff."

At another point in its charge (330a) the Court charged the jury as follows:

> "Even if you believe plaintiff's position that there were so many pebbles that an unsafe condition existed, you must consider, among other things, whether the defendant's foreman, Mr. DiLuzio, who

was the defendant's chief representative on the scene, should have had notice of this condition, in view of the fact that only an hour, approximately, elapsed between the time work started at this location and the time of the accident and the fact that plaintiff herself admitted that all the other workmen, except the man loosening the dirt in the pile of dirt for her, were on the other side of the track.

"You must decide whether this condition existed long enough so that the defendant, under all the circumstances, could be said to have failed to have used reasonable care in not removing the pebbles by sweeping or otherwise."

It should be noted that plaintiff, in her requests for charge, did not request the Court to instruct the jury that the defendant had a duty of antecedent inspection, but only a duty of inspection (362a-363a). The charge of the Court was thus in conformity with plaintiff's request.

Petitioner now contends, however, that the Trial Court erred in failing to charge that the defendant was under duty to make an inspection antecedent to the employees' working in the place in question, and impliedly contends that the failure to make such antecedent inspection in itself constitutes negligence, irrespective of the length of time the allegedly unsafe condition has existed and irrespective of whether the employer had actual or constructive notice of its existence. Such is not the law as set forth in the cases decided in this Court and the lower courts, and petitioner is in effect asking this Court to impose an additional burden upon the employer defendant, which burden was not contemplated by the Federal Employers' Liability Act.

The Act gives a right of action to railroad employees "for such injury resulting in whole or in part from the *negligence* of any of the officers, agents or employees of the carrier" (emphasis added). Although Congress has

eliminated certain common law defenses such as the bar of contributory negligence, assumption of risk, and the "fellow servant" doctrine, common law principles are still applicable in determining the alleged negligence of a defendant railroad employer—*i. e.*, the test is whether the employer *used reasonable care,* which question is for the jury to determine where there is probative evidence giving rise to such an issue. The Act does not prescribe the standards by which the jury shall determine what constitutes reasonable care. The cases have held that a railroad employer is not under an absolute duty to provide an absolutely safe place for its employees to work, but that *its duty is to use reasonable care to provide a reasonably safe place to work.*

In determining whether a person has used reasonable care where an unsafe or defective condition is disclosed either upon his premises or upon premises where his employees work, the authorities hold that it is necessary for the plaintiff to establish that the unsafe condition existed for a sufficient period of time prior to the injury so that the defendant may be considered to have had knowledge or notice of its existence in sufficient time to take steps to remedy the condition; the principle is and should be no different in this respect as to railroad employers and employees than it is with respect to other persons; *Kaminski* v. *Chicago River and Indiana R. Co.,* 200 F. (2d) 1 (C. A. 7, 1952); *Frizzell* v. *Wabash R. Co.,* 199 F. (2d) 153 (C. A. 8, 1952); *Wetherbee* v. *E. J. and E. Ry. Co.,* 191 F. (2d) 302 (C. A. 7, 1951); *Beattie* v. *E. J. and E. Ry. Co.,* 217 F. (2d) 863 (C. A. 7, 1954); *Finnegan* v. *Monongahela Connecting R. Co.,* 379 Pa. 63, 108 A. (2d) 321 (1954).

No case cited by Petitioner supports the proposition that there is an absolute duty of antecedent inspection imposed upon a railroad employer. The cases cited by Petitioner turn upon whether the railroad employer is deemed to have actual or constructive notice of the exist-

ence of the unsafe condition, by reason of (1) notice from the employee or others as to the condition; or (2) existence of the condition for a sufficient period of time so that it should have been discovered by the employer; or (3) an obvious extra-hazardous condition, such as a washout.

If Petitioner's position were adopted, a jury would automatically be required to find in favor of a plaintiff employee where the employee has been injured due to an unsafe condition, without considering the length of its existence, because the railroad employer would be required to have inspected its entire system, detected any unsafe condition and eliminated it prior to the arrival of the employee. Such a principle not only would impose an intolerable burden upon any railroad employer, but also it does not conform to the test established by the F. E. L. A. and the authorities.

The Court of Appeals therefore correctly affirmed the Trial Judge's charge as to the duty of inspection.

POINT III.

The Court of Appeals correctly affirmed the action of the Trial Judge in permitting the jury to consider whether plaintiff's injury was the result of an unavoidable accident.

Petitioner contends that because there was evidence in this case from which the jury might infer that plaintiff's injury was caused by defendant's negligence, the Trial Court should not have allowed the jury to consider the equally possible inference that plaintiff's injury was the result of an unavoidable accident. Such is not the law.

Not only did the pleadings (including defendant's Answer, which denied negligence) and the arguments of counsel for defendant (1b, 316a) support the possibility that plaintiff's fall was due to a pure accident, but also the testimony supported such a possible defense. Plaintiff, in giving her testimony at the hearing shortly after the accident, indicated that she did not know what caused

her to fall, and that she did not know whether she slipped or tripped, and she did not mention the possible existence of pebbles on the street (63a-71a); and she was short and stout (73a). Plaintiff's foreman testified that there were only a few scattered pebbles in the area where she fell and only 1, 2 or 3 pebbles at the point where she fell (221a-222a).

On the basis of that testimony it was quite possible (and indeed likely) that the jury would disbelieve the plaintiff's contention that she fell due to the existence of a mass of holes and pebbles on the street and would, on the other hand, find that plaintiff either slipped on a single pebble the size of a fingernail, for whose existence no one could reasonably be held liable or that she merely lost her balance or turned her ankle and fell.

The cases cited by Petitioner do not support her contention and are not applicable to the instant case, since they were cases in which no evidence was adduced at the trial which could support an inference of unavoidable accident, whereas in the instant case such evidence was present.

It is likewise submitted that the dissenting opinion of Judge Kalodner (16a) is incorrect in suggesting that the Trial Judge's instruction concerning the possibility of an unavoidable accident "inferentially ruled that there was no absolute duty on the part of the defendant to provide plaintiff with a reasonably safe place to work" and in effect removed the "safe place to work" issue from the jury's consideration. Judge Kalodner unjustifiably assumed (1) that the employer's duty to provide a reasonably safe place to work is *absolute* when in fact its duty is *to use reasonable care*, and (2) that the existence of one or two pebbles created *per se* an unsafe place to work, whereas a jury could, and should be permitted to find that the existence of those few, tiny pebbles did not create an unsafe place to work and, on the contrary, that plaintiff's injury was the result of an unavoidable accident.

POINT IV.

The Court of Appeals correctly affirmed the Trial Judge's charge as it dealt with plaintiff's burden of proving her case "by a preponderance of the evidence," even though it contained the words "convince" and "doubt."

The Court charged the jury as follows (329a):

> "The plaintiff has the burden of proving to you by the weight or the fair preponderance of the evidence that the defendant or its employees, other than the plaintiff, did not provide her with a reasonably safe place to work and that this negligence caused, in whole or in part, this injury to plaintiff. If, after considering all the evidence, the question of whether or not the defendant or its employees, other than the plaintiff, of course, were negligent in failing to use reasonable care to provide plaintiff with a safe place to work is so evenly balanced in your mind that you have no conviction, then you must find for the defendant. It is her burden to convince you that there was this negligence. Also, if the question of whether or not such negligence was a factor in causing the injury is so evenly balanced in your mind that you have no conviction, then you must find for the defendant."

And further (333a):

> "Now, this is one of the big points for you, this question of whether the plaintiff has proved to you by a preponderance of the evidence that there was a failure to use reasonable care under all these circumstances. There she was with her galoshes, her overalls, her work jacket. The evidence must do more than raise a doubt in your mind on these points, if plaintiff is to sustain the burden. If there is just a doubt in your mind, you must bring in a verdict for the defendant, and that ends your consideration of the

> case. You don't need to go any further. On the other hand, if you are convinced by the preponderance of the evidence that the defendant or its employees, other than the plaintiff, were negligent, and that this negligence was a factor in causing the injury, then you must find for the plaintiff."

Petitioner has extracted certain portions of those charges, has emphasized the words "doubt" and "conviction" and argues (p. 22) that by the use of those words the Court told the jury that the plaintiff must prove her case "beyond doubt".

Respondent submits that a fair-minded reading of the above quoted portions of the charge gives rise to no such interpretation. Nothing in the charge contained any reference to the plaintiff being obliged to prove her case "beyond doubt". The Court repeatedly used the phrase "by a preponderance of the evidence," not merely in other portions of the charge but in the specific portions in which the words "doubt" and "convince" were used.

Respondent submits that the effect of the Court's charge was to instruct the jury that there must be more than a scintilla of evidence raising a question in the juror's mind as to whether the defendant might have been negligent, before it could bring in a verdict for plaintiff upon the issue of negligence. As indicated by the Court in its Opinion and Order (395a-397a), the use of the words is consistent with the language of the United States Supreme Court in *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U. S. 104, at 112, 86 L. Ed. 89, 62 S. Ct. 156 at 161 (1941), where the Court stated:

> "Wherever the burden rests, he who undertakes to carry it must do more than create a doubt which the trier of fact is unable to resolve."

The opinion of the Court of Appeals (5a-9a) considers the use of the words "doubt" and "convince" in

considerable detail, in the light of the authorities. The cases cited in Judge Kalodner's dissenting opinion (11a-16a), and repeated in the Petition (22a-24a) were cases in which courts have held that to require a plaintiff to prove his case by "clear, convincing evidence" or "reasonable certainty" or beyond "any doubt" imposed too stringent a burden of proof upon the plaintiff. In those cases the Trial Judge failed to make clear in his charge that the jury need be only "convinced" by a preponderance of the evidence.

It is submitted that the analysis of the Court of Appeals was correct and that the charge of the Trial Court adequately explained the plaintiff's burden of proof.

POINT V.

The Court of Appeals correctly affirmed the action of the Trial Judge in charging that the jury "should no more be swayed by sympathy for the plaintiff than for the widows and orphans who may be receiving dividends or interest from the defendant company and who may need that income for themselves and for their families" and that no sympathy for either side should play a part in its decision.

At the trial plaintiff testified that she had raised two children who were not her own, and who were now grown up and living elsewhere (11a-12a). In spite of this testimony counsel for the plaintiff, in the course of his closing argument (303a-307a-8a), made an obvious attempt to appeal to the sympathy of the jury by conveying the impression that plaintiff needed, and was entitled to, a substantial sum, so that she could provide for two little children. The Court charged the jury as follows (325a):

> "If you are sympathetic or prejudiced in favor of or against either the plaintiff or the defendant, you should not allow such sympathy or prejudice to influence you at all in your verdict. You should no

more be swayed by sympathy for the plaintiff than for the widows and orphans who may be receiving dividends or interest from the defendant company and who may need that income for themselves and for their families. No sympathy of any sort for either side should play any part in your decision."

The Petitioner contends (25a) that this portion of the charge contained prejudicial error in that it brought "extraneous material" into the case. Respondent submits, however, that the charge was perfectly proper (1) in view of the conduct of plaintiff's counsel and (2) irrespective of such conduct.

As was pointed out in the opinion of the Court of Appeals (3a), a Federal Trial Judge has the right, indeed the duty, to make it clear to the jury that no sympathy of any sort for either side should play any part in their decision. The conduct of plaintiff's counsel, in injecting his improper attempt to appeal to the jury's sympathy, certainly deserved comment by the Trial Court in an effort to avoid a decision based on any such consideration. Contrary to the dissenting opinion of Judge Kalodner (11a) it is apparent that the Trial Judge was not seeking to "extinguish the flame of sympathy for foundlings ignited by plaintiff's counsel with a countering flame of sympathy for widows and orphans." A reading of the charge will indicate just the opposite; the Trial Judge was attempting, in as graphic a method as possible, to impress the jury with the need to eliminate from their consideration sympathy for either side.

Respondent further submits, however, that the thought expressed in this portion of the Trial Judge's charge would have been perfectly proper, even in the absence of the conduct of plaintiff's counsel in the instant case. Nowadays, when large verdicts in favor of individual plaintiffs against corporate defendants are often based, not on the weight of the evidence but on the jury's belief

in the defendant's supposed ability to pay (which belief creates, in effect, sympathy in favor of the plaintiff and prejudice against the defendant, irrespective of the testimony) it should be perfectly proper for a Trial Judge to do more than merely utter the sterile phrase "your verdict should not be based upon sympathy, bias or prejudice," but to go further and place the parties on equal terms in the eyes of the jury by a graphic example which, in effect, points out that while the plaintiff is an individual who may need money, a defendant corporation is actually made up of individuals who may also need money and therefore that the jury's consideration should not be based upon which party has or needs the money, but solely upon the facts relating to liability and damages.

Respondent therefore submits that the charge contained no prejudicial error in this respect.

CONCLUSION.

Contrary to the assertions of the Petition, this is not an important case, filled with significant legal principles requiring enunciation by this Court. It is purely and simply a case of a woman who fell on the street while carrying an empty shovel; who was able to have her case submitted to a jury against her railroad employer, solely by reason of her assertion (made five years after the accident and contradicted by her statement made two months after the accident and by ample testimony of other witnesses) that she fell due to the existence of a mass of pebbles where she was walking. Although almost devoid of any evidence which might impose liability upon her employer, the case was submitted to the jury upon a full, fair and complete charge, and the jury found in favor of the defendant.

Even taken out of context by Petitioner the portions of the Trial Court's charge complained of do not contain

prejudicial error; read in its entirety the charge will be seen to be fair to both parties. Neither the charge of the Trial Judge nor the Opinion of the Court of Appeals raises any new questions for this Court to consider. The cases cited by Petitioner, with which she contends the decision of the lower court is in conflict, in fact are not in conflict with it. Those cases either do not support the principles contended for by Petitioner or concern fact situations unrelated to those involved in the instant case.

If the Petition is denied, there will be no effect upon the law, either in F.E.L.A. cases or in general civil litigation, and will affect only Petitioner herself, whose right to recover has already been denied by a jury.

The Petition for a Writ of Certiorari should be denied.

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